

FILED
DISTRICT COURT OF GUAM

JUN 06 2011

10

**JEANNE G. QUINATA
CLERK OF COURT**

- 1 TEKER TORRES & TEKER, P.C.
Suite 2-A, 130 Aspinall Avenue
- 2 Hagåtña, Guam 96910-5018
Telephone: (671) 477-9891
- 3 Facsimile: (671) 472-2601
- 4 STEWART SOKOL & GRAY LLC (*Pro Hac Vice Pending*)
2300 SW First Avenue, Suite 200
- 5 Portland, Oregon 97201-5047
Telephone: (503) 221-0699
- 6 Facsimile: (503) 419-0281
- 7 Attorneys for Use Plaintiff and Plaintiff
IMCO General Construction, Inc.

10 IN THE DISTRICT COURT OF GUAM
11 TERRITORY OF GUAM

12 UNITED STATES for the use and benefit)
of IMCO GENERAL CONSTRUCTION,)
13 INC., a Washington corporation, and)
IMCO GENERAL CONSTRUCTION,)
14 INC., a Washington corporation,)
15 Plaintiffs,)
16 v.)
17 KEY TURF CONSTRUCTION, INC., a)
California corporation; WESTERN)
18 INSURANCE COMPANY, a Utah surety;)
SOUTH GULF, INC., a Florida)
19 corporation; INTERNATIONAL FIDELITY)
INSURANCE COMPANY, a New Jersey)
20 surety,)
21 Defendants.)

CIVIL ACTION NO. 11-00018

COMPLAINT

Jury Trial Demanded

23 Plaintiffs allege as follows:

I. JURISDICTION

25 1.1 Jurisdiction and venue are proper pursuant to 28.U.S.C. § 1332 and
26 40 U.S.C. § 3133.

Page 1 - COMPLAINT

STEWART SOKOL & GRAY LLC

ATTORNEYS AT LAW

ATTORNEYS
2300 SW FIRST AVENUE, SUITE 200
PORTLAND, OREGON 97201-5047
(503) 221-1699
FAX (503) 221-5706

1 1.2 Plaintiff IMCO General Construction, Inc. ("IMCO") is a Washington
2 corporation having its principal place of business in the State of Washington. IMCO
3 pursues this action both in its own name (as to Counts One and Two) and in the name of
4 the United States of America for the use and benefit of IMCO General Construction, Inc.
5 (as to Count Three).

6 1.3 Defendant Key Turf Construction, Inc. ("Key Turf") is a California
7 corporation having its principal place of business in the State of California. Defendant
8 Western Insurance Company ("Western") is a surety company domiciled in the State of
9 Utah that is authorized to issue surety bonds in the Territory of Guam.

10 1.4 Defendant South Gulf, Inc. ("South Gulf") is a Florida corporation with its
11 principal place of business in the State of California. Defendant International Fidelity
12 Insurance Company ("International") is a surety company domiciled in the State of New
13 Jersey that is authorized to issue surety bonds in the Territory of Guam.

II. GENERAL ALLEGATIONS

15 2.1 South Gulf served as the prime contractor on the construction project
16 owned by the United States Government known as the Andersen AFB, Guam, Project
17 AJY 97-5120, Contract FA5240-09-C-0009 (the "Project"). In connection with the
18 Project and as required by 40 U.S.C. § 3131 et seq., South Gulf, as principal, and
19 International, as surety, posted a payment bond (Bond #0468229) for the benefit of the
20 laborers and materialmen working on the Project in the penal sum of \$2,099,257.00
21 (hereinafter the "Miller Act Payment Bond").

22 2.2 Key Turf served as a first-tier subcontractor to South Gulf on the Project. In
23 connection with its subcontract, Key Turf, as principal, and Western, as surety, posted a
24 Subcontract Labor and Material Payment Bond (Bond No. BSC 00060) in the penal sum
25 of \$1,066,500.00 for the benefit of claimants providing labor, materials and equipment to
26 ///

**1 Key Turf and its subcontractors on the Project (hereinafter the “Subcontract Payment
2 Bond”).**

3 2.3 On or about July 26, 2010, Key Turf entered into a Subcontract Agreement
4 with IMCO for performance of certain work at the Project. Under the Subcontract
5 Agreement, Key Turf agreed to pay to IMCO in monthly installments the adjusted
6 subcontract price of \$439,630.50 in exchange for IMCO's performance of its work.

7 2.4 IMCO timely performed its work in accordance with the Subcontract
8 Agreement and submitted its pay applications to Key Turf. Key Turf failed and refused to
9 pay IMCO in full for its work. The value of IMCO's work for which it has not been paid is
10 at least \$242,303.91, plus accrued and accruing interest.

11 2.5 In addition, Key Turf's actions and inactions have prevented IMCO from
12 proceeding with work on the Project and has caused IMCO to incur delays, standby and
13 extra costs, inefficiencies and other delay damages. Through the end of May, 2011,
14 IMCO's delay and impact damages total approximately \$253,184, and such delay
15 damages continue to accrue.

III. COUNT ONE - BREACH OF CONTRACT

17 3.1 IMCO realleges and incorporates herein the allegations contained in
18 paragraphs 1.1 through 2.5.

19 3.2 Key Turf's failure and refusal to pay the amounts due under the
20 Subcontract Agreement, including payment for changed and extra work and delays,
21 constitutes a breach of that contract.

22 3.3 As a direct and foreseeable result of Key Turf's breach, IMCO has been
23 damaged in the amount of at least \$242,303.91, plus IMCO's delay and impact damages
24 in an amount to be proven at trial, all together with accrued and accruing interest at the
25 highest statutory or contract rate, plus its reasonable attorney fees and costs.

26 //

1 **IV. COUNT TWO - ACTION ON SUBCONTRACT PAYMENT BOND**

2 4.1 IMCO realleges and incorporates herein the allegations contained in
3 paragraphs 1.1 through 3.3.

4 4.2 Under the terms of the Subcontract Payment Bond, Western is bound to
5 pay the amounts owed to IMCO for the labor, materials and equipment furnished to the
6 Project and IMCO is entitled to bring this action to recover the unpaid amounts.

7 4.3 On or about February 14, 2011, IMCO caused to be delivered to Key Turf
8 and Western via certified mail, return receipt requested and U.S. first class mail, a notice
9 of bond claim, which set forth the amount due and owing to IMCO accompanied by
10 supporting documentation. A copy of IMCO's notice is attached hereto as **Exhibit A**.
11 Despite demand, IMCO has not been paid.

12 4.4 IMCO is entitled to recover from Western on the Subcontract Payment
13 Bond the amount of at least \$242,303.91, plus IMCO's delay and impact damages in an
14 amount to be proven at trial, all together with accrued and accruing interest at the highest
15 statutory or contract rate, plus its reasonable attorney fees and costs

16 **V. COUNT THREE - ACTION ON MILLER ACT PAYMENT BOND**

17 5.1 IMCO realleges and incorporates herein the allegations contained in
18 paragraphs 1.1 through 4.4.

19 5.2 Having supplied labor, materials and equipment to the Project as a
20 subcontractor to first-tier subcontractor Key Turf, IMCO is entitled to an action in the
21 name of the United States against International on the Miller Act Bond pursuant to
22 40 U.S.C. § 3133. On or about February 14, 2011, which is within 90 days after the day
23 on which IMCO last performed labor or furnished materials to the Project, IMCO caused
24 to be delivered to South Gulf and International notice of its claim setting forth the
25 amounts due and the name of the party to whom the material was furnished and for
26 whom the labor was performed. The notice was served via certified mail, return receipt

1 requested and by U.S. first class mail. A copy of IMCO's notice is attached hereto as
2 **Exhibit B.** IMCO has in all respects complied with 40 U.S. § 3131 et seq.

3 5.3 Pursuant to 40 U.S.C. § 3133, IMCO is entitled to recover from
4 International on the Miller Act Payment Bond the unpaid principal amount of
5 \$242,303.91, plus IMCO's delay and impact damages in an amount to be proven at trial,
6 all together with accrued and accruing interest at the highest statutory or contract rate,
7 plus its reasonable attorney fees and costs.

JURY TRIAL DEMAND

9 Use Plaintiff and Plaintiff IMCO demands a jury on all issues so triable.
10 WHEREFORE, Use Plaintiff and Plaintiff IMCO General Construction, Inc. prays
11 that it be awarded judgment as follows:

12 1. On Count One, against Key Turf in the amount not less than \$242,303.91, plus
13 IMCO's delay and impact damages in an amount to be proven at trial, all together with
14 accrued and accruing interest at the highest statutory or contract rate:

15 2. On Count Two, against Western in an amount not less than \$242,303.91, plus
16 IMCO's delay and impact damages in an amount to be proven at trial, all together with
17 accrued and accruing interest at the highest statutory or contract rate:

18 3. On Count Three, against International in an amount not less than \$242,303.91,
19 plus IMCO's delay and impact damages in an amount to be proven at trial, all together
20 with accrued and accruing interest at the highest statutory or contract rate:

21 4. Against all defendants on all counts, for its reasonable attorneys fees and
22 costs; and

23 //

24 III

25 III

26 III

5. All other and further relief to which IMCO General Construction, Inc. is entitled.

DATED at Hagåtña, Guam this 6 day of June, 2011.

TEKER TORRES & TEKER, P.C.

Bv:

Samuel S. Teker, Esq.

Samuel S. Vekler, Esq.
Attorneys for Use Plaintiff

Attorneys for CSE Plaintiff and Plaintiff
IMCO General Construction, Inc.

IMCO General Construction, Inc.